

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MATTHEW WRIGHT,

Case No. C19-1633RSM

Plaintiff,

ORDER ADOPTING REPORT AND RECOMMENDATION

V.

STATE OF WASHINGTON, et al.,

Defendants.

This matter comes before the Court on the Report and Recommendation (“R&R”) of the Honorable Brian A. Tsuchida, United States Magistrate Judge. Dkt. #55. Judge Tsuchida recommends granting the summary judgment Motion filed by Defendants State of Washington, Department of Corrections, Ron Fredericks, Michael Hathaway, Tracy Schneider, Tammy O'Reilly, and Melvin Hopkins, Dkt. #46, and dismissing the remaining claims with prejudice. The Court has reviewed the Objections filed by Plaintiff Matthew Wright, Dkt. #56, and response from Defendants, Dkt. #59.

In his Objections Mr. Wright challenges Judge Tsuchida's finding that he failed to exhaust administrative remedies related to the first two mail rejections by producing now, for the first time, copies of two kites that he purportedly sent to the mailroom. Dkt. #58-1. Defendants contend there is no evidence these were received and point out that Mr. Wright

1 asserted in his opposition to the summary judgment that “he does (sic) not retain copies of these
2 kites.” Dkt. #49 at 11. Defendants argue that these kites “pre-date the discussion with
3 mailroom staff on the kiosk system upon which the Report relied,” and that “[t]hose kiosk
4 messages, which Wright does not address in his declarations, foreclose his arguments that he
5 properly exhausted.” Dkt. #59 at 2.

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7 This Court has discretion but is not required to consider new evidence submitted for the
8 first time with objections to a report and recommendation. *See United States v. Howell*, 231
9 F.3d 615, 621-22 (9th Cir. 2000). Under the unique circumstances of this case, the Court finds
10 that consideration of Mr. Wright’s new evidence is unwarranted. Mr. Wright, represented by
11 counsel, has given the Court no argument as to why this new evidence should be considered
12 now, why it was not presented in the underlying motion, and why counsel explicitly stated in
13 briefing that he did not have this evidence. In any event, the Court agrees with Defendants that
14 the findings of the R&R can be supported even after consideration of this evidence due to the
15 content of the kiosk messages. *See* Dkt. #59 at 4–5.

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17 Mr. Wright presents no conclusive legal authority challenging the other findings of
18 Judge Tsuchida. The Court has otherwise found no error in the legal analysis and conclusions
19 of the Report and Recommendation justifying dismissal of Mr. Wright’s remaining claims and
20 a finding of frivolousness. Mr. Wright argues that such a finding should not count as a “strike”
21 under the three strikes provision of the PLRA or RCW 4.24.430 as he is not bringing this suit *in*
22 *forma pauperis*. Dkt. #56 at 7. Mr. Wright cites no legal authority for this argument. The
23 Court finds that a finding of frivolousness can be made here even though the suit was not
24 brought *in forma pauperis*.

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26 Given all of the above, the Court finds and ORDERS:
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- 1 1. The Report and Recommendation, Dkt. #55, is ADOPTED.
- 2 2. Defendants' Motion for Summary Judgment, Dkt. #46, is GRANTED. Plaintiff's
- 3 remaining claims are dismissed with prejudice.
- 4 3. The Court finds that Mr. Wright's claims are frivolous.
- 5 4. The Clerk shall send a copy of this Order to the parties and to Judge Tsuchida.

6 DATED this 16th day of December, 2020.



7 RICARDO S. MARTINEZ
8 CHIEF UNITED STATES DISTRICT JUDGE
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